

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RUSSELL YEAGER

Plaintiff,

v.

ALVAREZ, *et al.*,

Defendants.

3:11-cv-00515-LRH-VPC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

May 30, 2012

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion styled "Emergency Motion to Enjoin Retaliation," which the court analyzes as a motion for a temporary restraining order and/or preliminary injunction (#41).¹ Defendants opposed (#48) and plaintiff replied (#52). After a thorough review of the record, the court recommends that plaintiff's motion for a temporary restraining order and/or preliminary injunction (#41) be denied.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Russell Yeager ("plaintiff"), *pro se* inmate, is currently incarcerated at High Desert State Prison ("HDSP") in the custody of the Nevada Department of Corrections ("NDOC") (#44). However, the events giving rise to plaintiff's underlying complaint occurred at Lovelock Correctional Center ("LCC") (#5). Plaintiff brings his amended complaint pursuant to 42 U.S.C. § 1983, alleging violations of the First, Eighth, and Fourteenth Amendments, and violations under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *Id.* Pursuant to 28 U.S.C. § 1915A, the court screened the complaint and plaintiff's remaining claims allege violations under the First and Fourteenth Amendments, and RLUIPA against NDOC Director James "Greg" Cox, former

¹ Refers to the court's docket number. Plaintiff also filed related motions (#45, #47, #56) which the court will address.

1 NDOC Deputy Director Don Helling, Chaplain Richard Garcia, and correctional officers Sean
2 Alvarez and Rudy Garcia (“defendants”) (#3).

3 In counts I and II, plaintiff alleges that when NDOC placed him in disciplinary segregation
4 for fifteen days, defendants Alvarez and Garcia confiscated his religious property, including books
5 and literature at the direction of Chaplain Garcia (#5, pp. 4-8). Plaintiff claims that defendants acted
6 intentionally to interfere with and substantially burden his religious practice. *Id.* Plaintiff further
7 states that prison officials did not confiscate the religious property of other similarly situated
8 inmates. *Id.*

9 In count III, plaintiff alleges that defendants Cox and Helling’s implementation of
10 Administrative Regulation (“AR”) 810 violates his First and Fourteenth Amendment rights and his
11 rights pursuant to RLUIPA. *Id.* at 9-10. Plaintiff claims that he is prohibited from possessing certain
12 items to practice his religion that other similarly situated inmates are allowed to have for their
13 religions. *Id.* Plaintiff states that the list of NDOC-recognized religions set forth in AR 810 does
14 not include items central to his religion. *Id.* at 10.² Plaintiff practices the Thelema religion (#38, Ex.
15 G, p. 7).³

16 Plaintiff filed an earlier motion for injunctive relief on December 28, 2011, which the court
17 recommended be denied because plaintiff’s motion alleged claims unrelated to the underlying
18 lawsuit and plaintiff did not meet the requirements of preliminary injunctive relief (#13). Plaintiff
19 filed the present motion for injunctive relief on March 7, 2012 (#41). In his motion, plaintiff now
20 asks the court “to enjoin retaliation” related to his transfer to HDSP. *Id.* at 1. Plaintiff states that
21 he is currently pending release on parole and may be transferred to HDSP. *Id.* at 3. Plaintiff believes
22 the “transfer is predicated upon evil intent and not any legitimate purpose.” *Id.* Plaintiff argues that
23 he has “a protectable [sic] right to be free from abuse and violence” and a “right to access the court.”
24 *Id.* at 4. Plaintiff alleges that NDOC caseworker Harkreader retaliated against him because he filed
25 a lawsuit, and he now asks the court to enjoin such retaliation. *Id.* at 5. Plaintiff alleges a First
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27 ² Plaintiff does not specify which items he is prohibited from possessing.

³ Thelema is a spiritual pagan religion or practice.

1 Amendment retaliation claim and an access to courts claim against Mr. Harkreader. On March 15,
 2 2012, NDOC transferred plaintiff to HDSP (#44). Plaintiff subsequently filed a “notice to the court
 3 of retaliation” (#45), “supplemental motion and notice of facts in support of plaintiff’s claims of
 4 retaliatory transfer (#47), and a supplement to his reply (#56). These additional filings concern
 5 plaintiff’s allegations of retaliation and access to the courts stemming from his transfer to HDSP.

6 Defendants oppose plaintiff’s motion and contend that: (1) plaintiff cannot demonstrate that
 7 he has exhausted his administrative remedies with regard to his new First Amendment retaliation and
 8 access to the courts claims; and (2) plaintiff is improperly seeking injunctive relief for new claims
 9 unrelated to his underlying lawsuit (#48, p. 2).⁴ Lastly, defendants argue that plaintiff does not
 10 demonstrate the likelihood of success on the merits necessary for injunctive relief. *Id.*

11 Plaintiff replies that defendants are “skewing facts which are not relevant to matters before
 12 the court” (#52, p. 1). Plaintiff contends that he exhausted his administrative remedies as to his
 13 retaliation claims in January 2011. *Id.* Plaintiff argues that his retaliation claim is included in count
 14 III of his complaint. *Id.* at 4.

15 The court notes that the plaintiff is proceeding *pro se*. “In civil cases where the plaintiff
 16 appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit
 17 of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988); *see*
 18 *also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

19 II. DISCUSSION & ANALYSIS

20 A. Discussion

21 1. Temporary Restraining Order Legal Standard

22 A temporary restraining order is available when the applicant may suffer irreparable injury
 23 before the court can hear the application for a preliminary injunction. *See* Fed. R. Civ. P. 65(b); 11A
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25
 26 ⁴ The court notes that a failure to exhaust is an affirmative defense that defendants must raise
 27 and prove. *See Jones v. Bock*, 549 U.S. 199, 212-17 (2007). However, this defense is raised in a motion to
 dismiss if plaintiff filed a lawsuit based on an alleged First Amendment retaliation claim. Here, plaintiff did
 not file a lawsuit based on this claim. The court will address defendants’ argument that plaintiff seeks to
 enjoin conduct unrelated to the underlying lawsuit.

1 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2951
2 (3d. 1998). Requests for temporary restraining orders are governed by the same general standards
3 that govern the issuance of a preliminary injunction. *See New Motor Vehicle Bd. v. Orrin W. Fox*
4 *Co.*, 434 U.S. 1345, 1347 n. 2 (1977); *Los Angeles Unified Sch. Dist. v. United States Dist. Court*,
5 650 F.2d 1004, 1008 (9th Cir. 1981).

6 A preliminary injunction is an “extraordinary and drastic remedy” that is never awarded as
7 of right. *Munaf v. Geren*, 553 U.S. 674, 688-90 (2008) (citations and quotation omitted). Instead,
8 in every case, the court “must balance the competing claims of injury and must consider the effect
9 on each party of the granting or withholding of the requested relief.” *Winter v. Natural Resources*
10 *Defense Council, Inc.*, 555 U.S. 7, 17 (2008) (citation and quotation omitted). The instant motion
11 requires the court to determine whether plaintiff has established the following: (1) he is likely to
12 succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief;
13 (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter*, 555
14 U.S. at 17 (citations omitted).

15 Before *Winter*, courts in the Ninth Circuit applied an alternative “sliding-scale” test for
16 issuing a preliminary injunction that allowed the movant to offset the weakness of a showing on one
17 factor with the strength of another. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d. 1045, 1049-
18 50 (9th Cir. 2010); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). In *Winter*,
19 the Supreme Court did not directly address the continued validity of the Ninth Circuit’s sliding-scale
20 approach to preliminary injunctions. *See Winter*, 555 U.S. 7 at 51 (Ginsburg, J., dissenting)
21 (“[C]ourts have evaluated claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief
22 based on a lower likelihood of harm when the likelihood of success is very high . . . This Court has
23 never rejected that formulation, and I do not believe it does so today.”); *see also Alliance*, 632 F.3d.
24 at 1131. In light of the *Winter* decision, however, the Ninth Circuit determined that the Circuit’s
25 sliding-scale approach, or “serious questions” test “survives . . . when applied as part of the four-
26 element *Winter* test.” *Alliance*, 632 F.3d. at 1131-32. “In other words, ‘serious questions going to
27 the merits’ and a hardship balance that tips sharply toward the plaintiff can support issuance of an

1 injunction, assuming the other two elements of the *Winter* test are also met.” *Id.* The portion of the
 2 sliding-scale test that allowed injunctive relief upon the possibility, as opposed to the likelihood, of
 3 irreparable injury to the plaintiff, was expressly overruled by *Winter. Stormans, Inc. v. Selecky*, 586
 4 F.3d 1109, 1127 (9th Cir. 2009).

5 An even more stringent standard is applied where mandatory, as opposed to prohibitory
 6 preliminary relief is sought. The Ninth Circuit has noted that although the same general principles
 7 inform the court’s analysis, “[w]here a party seeks mandatory preliminary relief that goes well
 8 beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing
 9 a preliminary injunction.” *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir.
 10 1984). Thus, an award of mandatory preliminary relief is not to be granted unless both the facts and
 11 the law clearly favor the moving party and extreme or very serious damage will result. *See Anderson*
 12 *v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979). “[I]n doubtful cases” a mandatory injunction
 13 will not issue. *Id.*

14 Finally, the Prison Litigation Reform Act (“PLRA”) mandates that prisoner litigants must
 15 satisfy additional requirements when seeking preliminary injunctive relief against prison officials:

16 Preliminary injunctive relief must be narrowly drawn, extend no further than
 17 necessary to correct the harm the court finds requires preliminary relief, and
 18 be the least intrusive means necessary to correct that harm. The court shall
 19 give substantial weight to any adverse impact on public safety or the
 20 operation of a criminal justice system caused by the preliminary relief and
 21 shall respect the principles of comity set out in paragraph (1)(B) in tailoring
 22 any preliminary relief.

23 18 U.S.C. § 3626(a)(2). Thus, Section 3626(a)(2) limits the court’s power to grant preliminary
 24 injunctive relief to inmates. *Gilmore v. People of the State of California*, 220 F.3d 987, 998 (9th
 25 Cir. 2000). “Section 3626(a) . . . operates simultaneously to restrict the equity jurisdiction of federal
 26 courts and to protect the bargaining power of prison administrators – no longer may courts grant
 27 or approve relief that binds prison administrators to do more than the constitutional minimum.”
Gilmore, 220 F.3d at 999.

26 **B. Analysis**

27 Plaintiff asks the court for injunctive relief from conduct which is unrelated to the present

lawsuit. The Supreme Court has held that a preliminary injunction is appropriate to grant relief of the “same character as that which may be granted finally.” *De Beers Consol. Mines v. U.S.*, 325 U.S. 212, 220 (1945). A court may not issue an injunction in “a matter lying wholly outside the issues in the suit.” *Id.* A court need not consider claims that were not raised in the complaint. *McMichael v. Napa County*, 709 F.2d 1268, 1273 n.4 (9th Cir. 1983). Additionally, “a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party’s motion and the conduct asserted in the complaint.” *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994).

Courts use injunctive relief to address issues related to the underlying violations presented in the complaint. Plaintiff’s pending lawsuit includes claims related to the confiscation of religious property in April 2010 and claims related to the enforcement of AR 810. In his complaint, plaintiff alleges that on April 10, 2010, defendants confiscated his religious property including books and literature (#5, p. 4). Plaintiff further alleges that AR 810 proscribes certain items which plaintiff needs for religious worship. *Id.* at 9. Plaintiff’s underlying complaint concerns his rights to practice religion in prison. However, in his motion for injunctive relief, plaintiff alleges that caseworker Harkreader retaliated against plaintiff when he transferred plaintiff to HDSP because of plaintiff’s protected conduct (#41, p. 5). Plaintiff asks the court to enjoin the retaliatory transfer and in related motions and filings, he asks the court to return him to LCC and protect his right to access to the court (#45, #47, #56).⁵

Plaintiff does not link the conduct in this motion to the conduct in the present lawsuit. In his underlying complaint, plaintiff alleges violations related only to the confiscation of religious property and his ability to possess religious items. In his instant motion, he alleges a First Amendment retaliation claim related to his transfer from LCC to HDSP and a First Amendment access to courts claim. These allegations do not relate to plaintiff’s underlying claims regarding his religious rights and rights to equal protection. While plaintiff believes his instant motion relates

⁵ Since the filing of his motion (#41), NDOC transferred plaintiff to HDSP (#44). He now requests that the court return him to LCC and allow him to access the courts.

1 to count III of his complaint, the court is not convinced that such a relationship between these
2 matters exists. New unrelated complaints are properly lodged using the prison grievance system,
3 and if they remain unresolved, the plaintiff must file a new action. Moreover, plaintiff appears to
4 allege in his instant motion that caseworker Harkreader, who is not a defendant in the underlying
5 lawsuit, caused the retaliatory transfer and violation of plaintiff's access to the courts. The court
6 does not have jurisdiction to decide plaintiff's motion for injunctive relief, as his motion alleges
7 different claims than the claims in his complaint, and involves individuals who are not defendants
8 in the present lawsuit.

9 Due to these procedural deficiencies, the court will not undertake a full analysis of plaintiff's
10 request for injunctive relief. However, the court notes that plaintiff does not attempt to meet the
11 standard for the granting of injunctive relief and does not address the requirements for granting a
12 preliminary injunction. Plaintiff did not demonstrate that he is likely to succeed on the merits of
13 his claims because defendants provide evidence that NDOC transferred plaintiff to HDSP to assist
14 him in his efforts for release and not in retaliation against plaintiff (#48-1). As plaintiff has
15 submitted multiple motions to the court since his transfer to HDSP, his claim regarding access to
16 the courts is not likely to succeed on the merits. Plaintiff's motion does not warrant interference
17 with NDOC's internal processes. Therefore, the balance of equities does not favor issuance of an
18 injunction. Finally, the public interest is not served by allowing plaintiff to use the underlying
19 lawsuit as a platform for unrelated grievances.⁶

20 The court recommends that plaintiff's motion for injunctive relief (#41) and related motions
21 (#45, #47, #56)⁷ be denied because the allegations in the motions are not related to the allegations
22 in plaintiff's present lawsuit and involve individuals who are not defendants in the present lawsuit.
23

24 ⁶ Ordering NDOC to transfer plaintiff to another facility is not in the public interest because
25 the court is not in a position to decide security decisions in prisons. *See Turner v. Safley*, 482 U.S. 78, 89
26 (1987) (holding that the courts should not subject security-related judgments of prison officials to strict
27 scrutiny). Since his transfer, an LCC inmate has requested, and NDOC approved, to list plaintiff as an enemy
(#48-1). Thus, defendants contend that plaintiff cannot be returned to LCC.

⁷ In each of plaintiff's related motions or "notices" to the court, he alleges a claim of
retaliation or access to the courts, and asks the court to intervene and return him to LCC.

1 Furthermore, plaintiff did not demonstrate that he is likely to succeed on the merits, that he is likely
2 to suffer irreparable harm in the absence of injunctive relief, that the balance of equities tips in his
3 favor, or that an injunction is in the public interest.

4 **III. CONCLUSION**

5 Based on the foregoing and for good cause appearing, the court recommends that plaintiff's
6 motion for prospective injunctive relief (#41) and related motions (#45, #47, #56) be **DENIED**
7 because they allege claims which are not presently before the court. The parties are advised:

8 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
9 the parties may file specific written objections to this Report and Recommendation within fourteen
10 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
11 Recommendation" and should be accompanied by points and authorities for consideration by the
12 District Court.

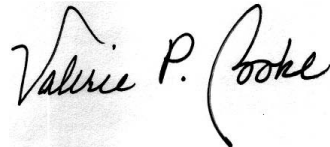
13 2. This Report and Recommendation is not an appealable order and any notice of appeal
14 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

15 **IV. RECOMMENDATION**

16 **IT IS THEREFORE RECOMMENDED** that plaintiff's motion for prospective injunctive
17 relief (#41) be **DENIED**.

18 **IT IS FURTHER RECOMMENDED** that plaintiff's related requests for injunctive relief
19 (#45, #47, #56) be **DENIED**.

20 **DATED:** May 30, 2012.

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23 **UNITED STATES MAGISTRATE JUDGE**
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